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No. 95-854

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOWE'S MARKETS INC., dba
ST. HELENS SHOP N' KART,
Petitioner,

v.

KEN MACKILLOP, KATHY MORRIS, KEN GABRIEL, CARL WOJCIECHOWSKI, HAROLD CARLSON and ROBERT HEWETT, as Trustees for the Oregon Federation of Butchers Pension Trust, OREGON RETAIL EMPLOYEES PENSION TRUST FUND and PORTLAND AREA UFCW LOCAL 555 - EMPLOYERS HEALTH TRUST
Respondents.

On Petition For Writ Of Certiorari
United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Did the Ninth Circuit Court of Appeals correctly hold that Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. §1145, required Petitioner to pay pension and health and welfare contributions to the Respondent employee benefit plans for the period prior to the date that a National Labor Relations Board Administrative Law Judge found that the Petitioner and United Food & Commercial Workers Local 555 both violated the National Labor Relations Act by entering into a collective bargaining agreement at a time when the union did not represent an uncoerced majority of the Petitioner's employees and that as a result the collective bargaining agreements were unenforceable.

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STATUTES INVOLVED

Section 515 of ERISA, 29 U.S.C. §1145

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

I. JURISDICTIONAL STATEMENT

This court's jurisdiction is based on 28 U.S.C. §1254 and not 29 U.S.C. §1332 cited in Petitioner's Petition which is a nonexistent statute.

II. STATEMENT OF THE CASE

Lowe's Markets, Inc., dba St. Helens Shop N' Kart (hereinafter the Employer) operated a grocery store in Oregon. In July 1991, United Food & Commercial Workers Local 555 (the Union) began to picket the Employer to advise the public that the Employer did not have a collective bargaining agreement covering its employees. After the picketing started, a majority of the Employer's employees signed a petition authorizing the Union to serve as their bargaining representative. The Employer gave the petition to the Union and, on August 2, 1991, the Employer entered into two collective bargaining agreements with the Union. The first collective bargaining agreement covered the Employer's meat department and required the Employer to make fringe benefit contributions to the Oregon Federation of Butchers Pension

Trust (Butchers Pension Trust) and the Portland Area UFCW Local 555 - Employers' Health Trust (Clerks Health Trust) on behalf of its meat cutters and meat wrappers. The second collective bargaining agreement covered the Employer's grocery, produce and deli departments and required the Employer to make fringe benefit contributions to the Clerks Health Trust and Oregon Retail Employees Pension Trust Fund (Clerks Pension Trust) on behalf of its grocery, produce and deli employees. (Pet. App. p.3)

The Butchers Pension Trust and Clerks Pension Trust provide retirement benefits to eligible participants and their beneficiaries and are "employee pension benefit plans" under § 3(2)(A) of the Employee Retirement Income Security Act, (ERISA) 29 U.S.C. § 1002(2)(A). The Clerks Health Trust provides health and welfare benefits to eligible participants and their dependents and is an "employee welfare benefit plan" under § 3(1) of ERISA, 29 U.S.C. § 1002(1). Numerous employers make pension and health and welfare contributions to the Butchers Pension Trust, Clerks Health Trust and Clerks

Pension Trust and the trust funds are "multiemployer plans" under § 3(37)(A) of ERISA, 29 U.S.C. § 1002(37)(A). (Pet. App. p.3)

In November, 1991, an employee of the Employer filed an unfair labor practice charge with the National Labor Relations Board. The unfair labor practice charge alleged that the Union and the Employer violated the National Labor Relations Act (NLRA) by entering into collective bargaining agreements at a time when the Union did not represent an uncoerced majority of the employees covered by each collective bargaining agreement. The Regional Office of the National Labor Relations Board issued a complaint against the Employer and Union and alleged the Employer violated §§ 8(a)(1),(2) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1),(2) and (3) by recognizing the Union as the employees' exclusive bargaining representative at a time when the Union did not represent an uncoerced majority of the Employer's employees. The National Labor Relations Board alleged the Union violated §§ 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. §§ 158(b)(1)(A)

and (2) by threatening to have employees discharged if they did not join the Union and by accepting recognition as the employees' exclusive bargaining representative at a time when it did not represent an uncoerced majority of the Employer's employees. (Pet. App. pp. 17-18). The Trust Funds were never a party to the NLRB proceedings.

When the Regional Office of the National Labor Relations Board issued an unfair labor practice complaint against both the Employer and the Union in January 1992, the Employer unilaterally stopped paying fringe benefit contributions to the Butchers Pension Trust , Clerks Health Trust and Clerks Pension Trust.

A National Labor Relations Board Administrative Law Judge subsequently conducted a full evidentiary hearing on the Regional Office's complaint. On February 24, 1993, the Administrative Law Judge issued his decision and found that both the Employer and Union had violated the NLRA by entering into the collective bargaining agreements at a time when the Union did not represent an uncoerced majority of the

Employer's employees. (Pet. App. p. 16) On August 18, 1993, the National Labor Relations Board affirmed the decision of the Administrative Law Judge with several minor changes not relevant to this Petition. (Pet. App. p. 40) The National Labor Relations Board found the collective bargaining agreements between the Union and the Employer never had legal effect for purposes of the NLRA.

Starting in June, 1992, the Butchers Pension Trust, Clerks Health Trust and Clerks Pension Trust brought lawsuits against the Employer in the U.S. District Court for the District of Oregon to recover the delinquent fringe benefit contributions that had accrued since December, 1991, when the Employer unilaterally stopped paying its fringe benefit contributions. The Employer filed a motion with the District Court to stay the lawsuits pending the outcome of the proceedings before the National Labor Relations Board. The District Court denied the Employer's motion. (Pet. App. p. 53)

The Butchers Pension Trust, Clerks Health Trust and Clerks Pension Trust moved for summary judgment on their

claim that the Employer had violated § 515 of ERISA, 29 U.S.C. § 1145, by failing to pay its fringe benefit contributions. The Employer filed a cross-motion for summary judgment claiming the collective bargaining agreements were void under the NLRA and, therefore, it had no obligation under ERISA to pay fringe benefit contributions. The District Court found that contract formation defenses arising under the NLRA were not a defense to employee benefit plans suits under ERISA and granted the Butchers Pension Trust's, Clerks Pension Trust's and Clerks Health Trust's motions for summary judgment and entered money judgments against the Employer. (Pet. App. p. 49)

The Butchers Pension Trust, Clerks Pension Trust and Clerks Health Trust brought a second set of lawsuits against the Employer to recover additional fringe benefit contributions which had accrued since the first judgment was entered through February 23, 1993 (the day before the Administrative Law Judge for the National Labor Relations Board found merit to the Regional Office's complaint). The parties entered into a

stipulated judgment which required the Employer to pay additional fringe benefit contributions to the Butchers Pension Trust, Clerks Pension Trust and Clerks Health Trust for this second time period.

The judgments subject to review in this Petition cover fringe benefit contributions owed by the Employer from December, 1991, through February 23, 1993. (Pet. App. p. 5) February 23, 1993, is one day before the Administrative Law Judge issued his decision and determined the collective bargaining agreements between the Employer and the Union were not enforceable under the NLRA. The Butchers Pension Trust, Clerks Pension Trust and Clerks Health Trust have not made a claim for any fringe benefit contributions from the Employer after the date the Administrative Law Judge determined the collective bargaining agreements were not enforceable under the NLRA.

The Petitioner appealed the District Court's decision to the Ninth Circuit Court of Appeals. A Ninth Circuit panel, in a unanimous decision, affirmed the judgments entered by the

District Court. (Pet. App. 1) The Employer's petition for rehearing was denied and its suggestion for rehearing en banc was rejected on August 31, 1995. (Pet. App. 62).

On August 18, 1995, the Employer filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Oregon. The bankruptcy was converted to a Chapter 7 liquidation on August 30, 1995. See Case No. 395-35660-dds7, United States Bankruptcy Court for the District of Oregon.

III. ARGUMENT

A. The Decision of the Ninth Circuit Court of Appeals is Consistent with Decisions from the Second, Third and Eighth Circuits.

The Employer's principal argument throughout this litigation has been that it should not be required to pay fringe benefit contributions under § 515 of ERISA, 29 U.S.C. § 1145 because the National Labor Relations Board determined that the underlying collective bargaining agreements were unenforceable under the NLRA.

The Trust Funds' lawsuits against the Employer, however, were not premised on the NLRA. The Trust Funds' lawsuits were brought under § 515 of ERISA, 29 U.S.C. § 1145 which creates a federal cause of action for employee benefit plans to collect delinquent contributions. Throughout this litigation, the Butchers Pension Trust, Clerks Pension Trust and Clerks Health Trust have emphasized that contract formation defenses (including those based on federal labor law) are not a defense to actions by employee benefit plans to collect contributions. The legislative history which preceded the enactment of § 515 of ERISA, 29 U.S.C. § 1145, and all the Circuit Court decisions which have addressed the issue recognize this point.

Among Congress' purposes in amending ERISA to add § 515 of ERISA, 29 U.S.C. § 1145, was to simplify and reduce the cost of collecting delinquent fringe benefit contributions owed to employee benefit plans by severely limiting the defenses available to employers. See *Laborers Health and Welfare Trust v. Advanced Lightweight Concrete*, 484 U.S. 539,

546-48 (1988). The Senate Labor Committee provided the following legislative history:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor management relations law - other than 29 U.S.C. § 186. (emphasis added)

The Senate Committee on Labor and Human Resources, S 1076 *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration.* 96th Cong. 2d Sess. 43-44 (April, 1980) quoted in *Laborers Health and Welfare Trust v. Advanced Lightweight Concrete,* 484 U.S. at 547 fn. 14 (1988). See also, *Central States Pension Fund v. Gerber Truck Service, Inc.,* 870 F.2d 1148, 1153 (7th Cir. 1988).

All the circuit courts that have considered the issue have held an employer is under an obligation to pay fringe

benefit contributions to employee benefit plans even though the union did not have the support of a majority of the employees at the time the collective bargaining agreements were negotiated. *Agathos v. Starlight Motel*, 977 F.2d 1500, 1506 (3rd Cir. 1992) (employer could not defeat employee benefit plan's collection action by asserting the union lacked majority support at the time the collective bargaining agreement was signed); *Berry v. Garza*, 919 F.2d 87, 90 (8th Cir. 1990) (employer was estopped from raising the defense of lack of majority support by the union to avoid its obligations to the employee benefit plan) and *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 316 (2nd Cir. 1990) *cert. denied* 498 U.S. 982 (1990) (employer could not raise the union's lack of majority support as a defense to an action to collect delinquent fringe benefit contributions).

In summary, the decision of the Ninth Circuit Court of Appeals is consistent with a substantial body of law which has developed under § 515 of ERISA, 29 U.S.C. § 1145 that prohibits employers from avoiding their fringe benefit

obligations by challenging the validity of the underlying collective bargaining agreement.

B. The Garmon Decision Has No Relevance to this Case.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court stated that, as a general rule, federal courts do not have jurisdiction over activity which is arguably subject to sections 7 or 8 of the NLRA, 29 U.S.C. §§ 157 and 158, and they must defer to the specialized knowledge and experience of the National Labor Relations Board in dealing with this area of the law. 359 U.S. at 242 and 245.

This case, however, does not deal with the NLRA. This lawsuit was brought under ERISA over which federal courts have exclusive jurisdiction. See § 502(e) of ERISA, 29 U.S.C. § 1132(e). The decision of the National Labor Relations Board involved an interpretation of the NLRA. The decision in this case involved an interpretation of ERISA over which the National Labor Relations Board has no jurisdiction. *Martin v.*

Garman Construction Co., 945 F.2d 1000, 1006 (7th Cir. 1991) *cert. den.* 502 U.S. ____, 117 L.Ed. 2d 476 (1992). The Ninth Circuit Court of Appeals did not interpret the NLRA in reaching its decision. The *Garmon* preemption doctrine which is applied to activity or conduct that is arguably subject to sections 7 or 8 of the NLRA has no relevance to this case.

C. The Decision of the Ninth Circuit Court of Appeals is Consistent With Its Earlier Decisions.

In *Sheet Metal Workers' International Association v. West Coast Sheet Metal Co.*, 954 F.2d 1506 (9th Cir. 1992) and *Laborers Health & Welfare Trust Fund v. Westlake Development*, 53 F.3d 979 (9th Cir. 1995), the Ninth Circuit dealt with when an employer's obligation to contribute to an employee benefit plan ceased. In the *West Coast Sheet Metal* case, the Ninth Circuit held an employer's obligation to contribute ceased at the time the employees decertified the union as their exclusive bargaining representative. In this case, the Ninth Circuit held the employer had an obligation to contribute to the Butchers Pension Trust, Clerks Pension Trust and Clerks Health Trust through the date an Administrative Law Judge ruled the

collective bargaining agreements were not enforceable under the NLRA. The decision in this case and the *West Coast Sheet Metal* case are compatible. Both cases hold an employer must continue to contribute to an employee benefit plan until the National Labor Relations Board has ruled the union is no longer the employees' exclusive bargaining representative.

The *Westlake Development* case dealt with the unusual situation where the collective bargaining agreement in the construction industry covered one individual. In such a situation, the Ninth Circuit held an employer could repudiate its collective bargaining agreement and cancel its obligation to pay fringe benefit contributions from the date of repudiation forward. The Ninth Circuit Court of Appeals adopted this rule because the National Labor Relations Board does not conduct decertification elections in a one-employee bargaining unit. There is nothing inconsistent between the *Westlake Development* decision and this case. In both cases, the Ninth Circuit Court of Appeals dealt with when an employer's obligation to pay fringe benefit contributions ceased. The Ninth Circuit Court of

Appeals developed different rules to deal with two distinct fact situations.

D. There Are No "Special and Important Reasons to Grant Certiorari as Required By Rule 10.1.

This case does not meet any of the "special and important reasons" the Supreme Court relies upon when deciding whether to grant certiorari.

1. This case does not create a conflict among the Circuit Court of Appeals.

2. There has been a limited record developed in this case. The District Court resolved this case on cross motions for summary judgment.

3. This case does not involve complex or novel legal issues which, as a matter of public policy or widespread public concern, require the Supreme Court's attention. The decision in this case is consistent with the decisions reached by the Second, Third and Eighth Circuit Courts of Appeals in the *Benson*, *Agathos*, and *Berry* cases.

4. The Employer is no longer in business and is going through a Chapter 7 bankruptcy liquidation.

IV. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted this 28th day of December, 1995

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